JUDGING "NEW LAW" IN ELECTION DISPUTES

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I. INTRODUCTION

In disputed presidential and other elections, what is the appropriate relationship between state law and state institutions versus national law and national institutions? What does the constitutional law of elections, prior to the 2000 presidential election, tell us about how that relationship has long been legally understood? This broader jurisprudence of elections offers a more general, external stance from which disputes over this relationship surrounding *Bush v. Gore* can be helpfully assessed.

Two alternative starting points for defining the national/state legal relationship over elections can readily be identified. One view would emphasize the importance of the autonomy of state election law from federal control, whether the election is for state or federal office. If this view seems surprising when it comes to federal elections—particularly when it comes to elections for the highest national office in the land—it is a surprise that can nonetheless be rooted in the text of the U.S. Constitution itself. Article II allocates to the states the power to enact presidential-elector legislation in the first place. From there it is hardly a large structural leap to infer that state institutions ought to have the central (perhaps, exclusive) role in implementing this legislation. That power would, on this view, necessarily include the lesser power to resolve disputes over the meaning of such legislation through ordinary state-law processes. Indeed, the exclusivity or autonomy of state dispute-resolution law

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might arguably be itself constitutionally enshrined: the very Article II commitment to state control over presidential-elector selection might be viewed as uniquely insulating the states from national control in this context. Thus, whether it is the U.S. Congress or the U.S. Supreme Court that would seek to override state law and state interpretation of state law, Article II might be thought to preclude such exercises of national power. That result might be considered a quirky, even dysfunctional remnant of the original constitutional structure; after all, why should states and state law play such a dominant role in resolving disputes over presidential elections, given the transparent national interests at stake? Yet such a result would be no odder than the Electoral College itself. And just as we must aggregate votes through that institution absent constitutional change, we might similarly be bound through Article II to acknowledge the exclusive role of state interpretation of state law in the presidential election context.

But more than text, originalism, and constitutional structure might be offered to defend this first view. Contemporary functional justifications can also be marshaled to support state-law autonomy even in federal elections; indeed, these functional justifications would track the values associated more generally with the decentralized election structure that has long characterized elections in the United States, even for national office. As James Gardner puts it in his contribution to this symposium, we could imagine that electoral decentralization, including the radical decentralization involved with leaving individual counties even such choices as how to design ballots, is a structural means of hindering a single set of partisan forces from gaining unified control over drafting and administering election rules.[1] Even seemingly technical and arcane election rules, we know, can affect electoral outcomes—particularly when we focus on the cumulative effect of unified control over numerous such rules. On this view, then, what looks like a chaos of local rules, practices, standards, and structures for resolving national elections becomes a rational, "realist-"inspired means of deploying dramatic decentralization to avoid partisan capture of elections. This functional view would apply just as much to national elections as to any other. The first federal judge to address the merits of the Bush campaign's federal constitutional claims, Judge Middlebrooks, took essentially this view:

> Rather than a sign of weakness or constitutional injury, some solace [concerning Florida's highly decentralized electoral system] can be taken in the fact that no one centralized body or person can

1. James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 651-58 (2001).

> control the tabulation of an entire statewide or national election. For the more county boards and individuals involved in the electoral regulation process, the less likely it becomes that corruption, bias, or error can influence the ultimate result of an election.[2]

Corruption can counteract corruption, perhaps, where election regulation and administration is radically decentralized.

The alternative starting point would begin by emphasizing the constitutional status of the right to vote and the values associated with that right's constitutional—hence, national—position. Since the 1960s, the right to vote, even for state and local offices, *has* been recognized to implicate constitutional values of political equality. To constitutionalize the right to vote is, by definition, to nationalize its entailments and safeguards; it is to recognize a constitutional, hence national, interest in uniform, consistent treatment of certain aspects of voting and political representation. Indeed, constitutional doctrine has been concerned since the 1960s about ensuring protection of the interests secured through "the right to vote" even in state, local, and yet more narrowly confined elections;[3] surely the force of this constitutional right will be not just equally powerful but at its strongest when it comes to national elections—particularly elections for the Presidency. Indeed, before *Bush v. Gore*, Supreme Court decisions already had recognized distinct national and constitutional interests associated with presidential elections.[4] In other words, constitutionalization of the right to vote (and political rights closely associated with the right to vote), along with judicial recognition of unique constitutional interests associated with presidential elections, reflects a fundamental resistance to unqualified endorsement of state autonomy and radical decentralization of the voting process—particularly for national elections. More-

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2. Siegel v. LePore, 120 F. Supp. 2d 1041, 1052 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000).

3. *See, e.g.*, Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970) (applying one-vote, one-person to elections for trustees of local junior college district authority); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (extending the right to vote to local elections); Avery v. Midland County, 390 U.S. 474 (1968) (holding that one-vote, one-person doctrine applies to elections for local commissioners courts in Texas). In recent years, the Court has qualified the application of one-vote, one-person to certain special purpose local elections. *See, e.g.*, Ball v. James, 451 U.S. 355 (1981) (rejecting application of one-vote, one-person to "narrow, special" purpose electoral bodies).

4. Thus, in ballot-access cases, the Court first struck down restrictive laws in the context of presidential elections. *See* Williams v. Rhodes, 393 U.S. 23 (1968) (sustaining ballot-access challenge by third-party presidential candidate). Similarly, the Court has limited the power states otherwise have over primary election structures when the states seek to extend those powers into direct control of national political party conventions. *See* Democratic Party v. Wisconsin, 450 U.S. 107 (1981) (holding unconstitutional state law that required state-chosen presidential delegates to vote in accord with results of state's open-primary process, despite National Democratic Party rule requiring that only Party members be able to participate in selection of National Democratic Party's nominee).

over, to the extent the "autonomy of state law" view rests on historical pedigree, the entire development of the modern right to vote jurisprudence rests on a rejection of this history's authority for contemporary constitutional law.

Undeniable tension thus exists between the role of state and national law in the electoral process. The question is how that tension, then, is best resolved. More particularly, the specific issue is what role, if any, federal courts should play in determining whether state courts, when they interpret state election statutes, have inappropriately made "new law"—in presidential or other elections. The contributions to this symposium of both Robert Schapiro and James Gardner, two leading authorities on state constitutionalism, press for considerable autonomy of state election law.[5] On their view, aspects of *Bush v. Gore* reflect an inappropriate "centralization of power in the national government."[6] This centralizing tendency is most dramatically displayed in the concurring opinion's dismissal of the Florida Supreme Court's reading of state law; that concurrence comes close to treating the meaning of state presidential-elector laws as itself directly a question of federal law. From the perspective of state constitutionalism, Schapiro and Gardner criticize the dramatic intrusion into state judicial processes that the concurrence represents.

There is force in this plea for the independence of state law. But from the perspective of election law, state election-law decisions cannot be wholly free from constitutional oversight; a view that would make state law completely autonomous would give too little weight, in my view, to a legitimate constitutional interest in ensuring the integrity of electoral processes. I want to map out a different course for engaging the tension between state and national institutions; I will situate *Bush v. Gore* in the less overwhelming context of more routine electoral disputes and the approach lower federal courts have taken to those disputes. What emerges from this body of law is, on the one hand, an acknowledgment of national constitutional interests in overseeing election disputes and state judicial interpretations of state election laws. Indeed, this approach is more aggressively "cen-

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5. Gardner, *supra* note 1, at 627; Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 661, 678 (2001).

6. Gardner, *supra* note 1, at 658. Both papers come from leading authorities on state constitutionalism, a field that has been identified as worthy of its own study but understudied until recently; *Bush v. Gore* perhaps will catalyze greater attention to the role of state constitutions. For other studies of state constitutionalism and the distinct structure and function of state courts and state constitutions, see Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001), and Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 131 (1999). On state constitutional law theory, see also Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998).

tralizing" than even the concurrence in *Bush v. Gore*, for that concurrence would limit federal oversight to the context of presidential elections. In contrast, the approach I identify here finds national constitutional interests implicated even in state and local elections. Yet at the same time, the approach I identify here is more rule-bound and circumscribed than that in *Bush v. Gore* itself. Indeed, by showing how even the federal courts most committed to aggressive federal oversight of election disputes have justified and confined their oversight, the singularity of *Bush v. Gore*—in its view of the relationship between federal and state law—becomes even more apparent.

II. THE ISSUE DEFINED: CHANGING ELECTION RULES IN THE MIDST OF ELECTION CONTROVERSIES

Throughout the election litigation, a principal concern on all sides—and certainly of the United States Supreme Court—was whether various actors were changing prior Florida law or practice as specific issues arose: whether to permit a recount at all, for how long, under what standards, and the like. Although the per curiam's resolution did not formally turn on a conclusion that the Florida Supreme Court had improperly changed state law, it is undeniable that such a concern was a driving force in the Supreme Court majority's response to the entire litigation. Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, joined by Justices Scalia and Thomas, does, of course, come down strongly for the view that the Florida Supreme Court had indeed changed state law in the guise of interpreting it.[7] Indeed, so strongly did these three Justices hold this view that they excoriated the Florida Supreme Court in the most contemptuous terms: the Florida court's readings were "absurd," ones "[n]o reasonable person" would endorse, and "plainly departed from the legislative scheme."[8] Prominent academic defenders of the Court, such as Richard Posner and Richard Epstein, have also argued that this view—that the Florida courts had changed state law—provides the most convincing legal justification for the result in *Bush v. Gore*.[9]

Cast in general terms, Judge Posner's animating principle is one with which all of us can no doubt agree: "Nothing is more infuriating than changing the election rules after the outcome of the election,

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7. Bush v. Gore, 531 U.S. 98, 117-20 (2000) (Rehnquist, C.J., concurring).

8. *Id.* at 118-19.

9. *See, e.g.*, Richard A. Epstein, "*In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 13, 21, 35-37 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Electronic Dialogue between Judge Richard A. Posner and Professor Alan M. Dershowitz, *The Supreme Court and the 2000 Election*, SLATE, July 2-9, 2001, *at* http://slate.msn.com/?id=111313 ("The problem at hand is a state court's intervening to change the result of an election of the state's presidential electors by changing the ground rules under which the election was held.") (Monday, July 9).

conducted under the existing rules, is known."[10] Both the concurrence and these commentators locate the constitutional bar against such changes in Article II, Section 1.[11] This concern about changes in state law also looms over the per curiam's alternative equal protection analysis. The Florida Supreme Court recount order permitted inconsistent treatment between counties regarding what would constitute an actual vote. This was one of the equal protection violations the United States Supreme Court found. In addition, the per curiam found constitutional defects in "the actual process" in which the manual recount would be undertaken. The Florida courts

> did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.[12]

These concerns might doctrinally be best located in the Due Process Clause, though the per curiam folded them into its equal protection analysis. But regardless of the doctrinal cubbyhole, the underlying concern here too is that the recount process would not provide enough security against the potential manipulation of state law and practice; in other words, the prospective possibility that rules would be changed in the middle of the game also formed one grounding for the per curiam opinion.

Finally, questions at the oral arguments revealed how tempted certain Justices were to the view that the Florida Supreme Court had changed state law, even if these Justices ultimately did not make that view the announced basis for their decision. Justice O'Connor, for example, twice referred to the "special deference" she thought state courts might owe state legislatures when interpreting election statutes in a presidential election, "so as to avoid having the law changed after the election."[13] Justice Kennedy similarly asked whether "the Florida legislature [could] have done what the [Florida] supreme court did" and suggested the answer was no, "because that would be a new law . . . ."[14]

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10. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 159 (2001).

11. U.S. CONST. art. II, § 1. This now-famous provision provides that states shall choose presidential electors "in such Manner as the Legislature thereof may direct . . . ."

12. Bush v. Gore, 531 U.S. at 109.

13. Tr. of Oral Arguments at 7, 43-44, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949) (Dec. 11, 2000), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/00-949.pdf. (An unofficial transcript of the oral arguments in *Bush v. Gore* revealing the remarks of each individual Justice is available at http://www.npr.org/news/national/election2000/specials/supremecourt/001211.court.html).

14. *Id.* at 39-41.

The concern about "new state law" being made in the context of election litigation thus played a dominant role in the Supreme Court's response to and resolution of the 2000 election. This concern about changes in state law and practice is both predictable and pervasive in election disputes. Predictable, because in closely disputed races, each side will accuse those who rule against it of having intentionally changed the rules in order to produce that result—and the losing side will likely believe its own accusations sincerely. Pervasive, because unless the rules or established state practices are precise and comprehensive in advance, it is likely that gaps will emerge in the application of those laws to the specifics of any particular election dispute. When these gaps must be resolved in the context of a pending dispute, rather than ex ante, courts or administrative officials—and those who observe them—will know (or believe they know) the likely effect on the outcome of closing the legal gap in one way rather than another. Courts cannot blind themselves to the likely outcome-influencing effects of their legal rulings; hence the fear that courts will be motivated by knowledge of those effects will be present whenever clear consensus on litigated issues is absent—as it often will be. For strong believers in decentralized decisionmaking over electoral issues, even in national contests, this concern will not be enough to justify recognition of a countervailing federal constitutional interest that would guard against the creation of "new law." But well before *Bush v. Gore*, a number of federal courts had recognized exactly such a constitutional interest. Grounding the analysis in this previously established "law of new law" provides a way of stepping outside the highly charged context of *Bush v. Gore* to gain a more general perspective.

III. THE CONSTITUTIONAL INTEREST IN AVOIDING "NEW LAW" IN STATE AS WELL AS FEDERAL ELECTION DISPUTES

Broadly cast, the question is this: What substantive reasons, if any, should be sufficient to justify constitutional oversight of election disputes, be they state or federal? What exactly are the federal constitutional interests (or, statutory interests, if relevant) in various aspects of the election process, including in potential disputes that arise after the election? To what extent does or should the federal interest vary when state offices rather than national offices are at stake, or when different national offices, with different electoral processes—such as the House, the Senate, or the Presidency—are involved?

The framework within which this issue is to be considered must begin with a recognition of this central problem: every dispute about election processes implicates, by definition, questions involving vot-

ing and democratic processes. In a colloquial sense, then, every dispute about elections could be said to implicate "the right to vote." This is true for state elections as well as federal elections. But if every dispute implicated "the right to vote" in *a constitutional sense*—under the Fourteenth Amendment, for example—then every issue concerning disputed elections, state or federal, would be transformed into a federal constitutional issue. Federal constitutional law would then be turned into a detailed election code for both state and federal elections. This would hardly be unprecedented in democratic countries. In France, for example, the Constitutional Council (comparable to the U.S. Supreme Court) sits as the election overseer for all parliamentary elections and has broad administrative powers over the conduct of local elections—including the resolution of election disputes.[15]

American legal and political practice, however, has been quite different. Just as the United States Supreme Court has resisted constitutionalizing the vast body of state tort law and has refused to permit the ordinary deprivation of state-law property interests to be transformed into Fourteenth Amendment issues where state procedures are adequate,[16] the federal courts have similarly declined to transform most issues involving the conduct and resolution of elections into federal constitutional matters. The unique legal architecture of American democracy—a product of the oldest constitutional design in the world and subsequent legal additions built upon that original structure—represents a complex interlacing of federal and state interests in matters of voting, elections, and political participation. Many of the issues involving electoral structures are left to be resolved at the state level, even when national offices are at stake. The original Constitution, for example, only specifies voter eligibility requirements for one national office, the House of Representatives.[17] Even here, the federal requirements were designed to be wholly derivative of state-law suffrage requirements. For example, Article I, Section 2 states that electors for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[18] Defining the boundary line, then, between issues left to be resolved as a matter of state law and issues that instead implicate distinct federal constitutional interests re-

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15. Noëlle Lenoir, *Constitutional Council Review of Presidential Elections in France and a French Judicial Perspective on* Bush v. Gore, *in* THE LONGEST NIGHT: PERSPECTIVES AND POLEMICS ON ELECTION 2000 (Arthur Jacobson & Michel Rosenfeld eds., forthcoming 2001-02) (manuscript at 6-7, on file with the *Florida State University Law Review*).

16. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981).

17. This structure was modified in 1913 by the Seventeenth Amendment, which mandates direct election for senators. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

18. *Id.* art. I, § 2, cl. 1.

quires working out the intricate relationship between federal and state law that has long structured the American democratic system—even for national offices.

On the one hand, the courts have recognized several discrete and specific constitutional interests in the structuring of elections. The courts recognized most of these interests only beginning in the 1960s, after *Baker v. Carr*[19] effectively overturned *Giles v. Harris*[20] and endorsed the justiciability of claims involving "political rights." Thus, state election districts must comply with the one-vote, one-person principle. The Constitution also imposes constraints on partisan and racial design of all election districts.[21] In addition, since *Harper v. Virginia Board of Elections*,[22] the Court has also held that definitions of who can participate in what elections, on what terms, are subject to equal protection and due process review. Similarly, the Constitution imposes constraints on the conditions states can impose upon candidates seeking to be listed on the ballot.[23] So, too, the Constitution's First Amendment recognizes associational rights that protect the integrity and autonomy of political parties from certain types of state regulation.[24] State election laws that discriminate on their face along racial lines have been unconstitutional since the line of cases that banned "the white primary,"[25] and of course election laws that reflect an impermissible racial or ethnic purpose are unconstitutional under either the Fourteenth or Fifteenth Amendments.[26] Finally, the most important federal statute that overlays state elections, the Voting Rights Act,[27] prohibits electoral structures and practices whose purpose or effect is to dilute the voting power of certain statutorily protected groups.[28] These provide most of the specific, targeted federal interests in election processes, both state and federal.

On the other hand, if there were a more generalized constitutional interest in ensuring "the integrity of the electoral process" or in securing "fundamental fairness" in elections, then every dispute over

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19. 369 U.S. 186 (1962).

20. 189 U.S. 475 (1903) (holding that claims of "political rights" were not justiciable). For the history of *Giles* and its influence on subsequent constitutional law, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

21. On partisan constraints, see *Davis v. Bandemer*, 478 U.S. 109 (1986); on racial constraints, see *Shaw v. Reno* 509 U.S. 630 (1993).

22. 383 U.S. 663 (1966).

23. *See* Williams v. Rhodes, 393 U.S. 23 (1968) (sustaining ballot access challenge by third-party presidential candidate).

24. Cal. Democratic Party v. Jones, 530 U.S. 567, 572-74 (2000).

25. These cases start with *Nixon v. Herndon*, 273 U.S. 536 (1927), and end nearly thirty years later with *Terry v. Adams*, 345 U.S. 461 (1953).

26. The most recent application of this principle, in the Fifteenth Amendment context, is *Rice v. Cayetano*, 528 U.S. 495 (2000).

27. 42 U.S.C. § 1973 (1994).

28. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

the running of elections would indeed be subject to potential federal oversight and control. To avoid this prospect, federal courts have sought to delineate the distinction between specific, well-defined federal interests in the conduct of elections and the array of other issues that might be disputed; the latter election-related issues have long been treated as best resolved through the ordinary processes of state law. Thus, disputes about whether vote counts were in error due to technological defects are not recognized as implicating federal interests. As the Fifth Circuit acknowledged in an oft-cited case, the failure to count votes adequately, stated abstractly, could easily sound like a constitutional issue. [29] But the way the American legal structure conventionally gives content to this abstract right requires attending to the functional structure embodied in the Constitution, the nature of the federal court system, the limits of federal jurisdiction, and the role of states in election processes. As the late Judge Rubin put it, in writing for the Fifth Circuit, federal law must

> recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause. The unlawful administration by state officers of a non-discriminatory state law, "resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."
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> . . . If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss. . . . [Constitutional law does] not authorize federal courts to be state election monitors.[30]

This is typical of the bulk of federal court opinions. For similar reasons, federal courts have also held that the mere violation of a state statute by an election official is not a constitutional violation; nor are errors and irregularities that can be expected of the electoral process; nor is improper counting of ballots absent aggravating factors such as fraud or racial discrimination.[31]

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29. Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980).
30. *Id.* at 453-54 (citations omitted).
31. Hennings v. Grafton, 523 F.2d 861, 865 (7th Cir. 1975). The Court stated that the work of conducting elections in our society is typically carried on by volunteers and recruits for whom it is at most an avocation and whose experience

Yet at the same time that courts have resisted constitutionalizing most aspects of disputed elections, some federal courts have recognized at least one kind of relevant federal interest: an interest in providing security against state courts or other state actors developing "new law" in the context of resolving election disputes. Changes in state law or practice, whether through judicial or administrative action, can reach the point of what these federal courts have called "patent and fundamental unfairness,"[32] enough so that federal constitutional violations arise. Those federal courts that have identified such an interest, before *Bush v. Gore*, have done so even when the election at issue was for state or local office. Thus, these cases have identified a general constitutional interest, not confined to presidential elections, in the avoidance of "new law." But these courts have also cautioned that for a constitutional violation of this sort to arise, the "situation must go well beyond the ordinary dispute over the counting and marking of ballots."[33]

These cases, therefore, provide a partial rejection, even before *Bush v. Gore*, of the position that no federal interest is implicated in the way state courts interpret their own state election laws—and this interest is strong enough to apply even when the underlying election itself is for state office. These cases thus constitute the outer edge of a new frontier in the application of constitutional law to election disputes. At the same time, the way these courts have approached the freighted question of when "new law" has in fact been created reveals an adjudicatory practice that has developed relatively precise criteria for identifying "new election law." How the approach of the United States Supreme Court compares to this approach from the few federal courts previously willing to act in this area is the topic to which I now turn.

> and intelligence vary widely. Given these conditions, errors and irregularities, including the kind of conduct proved here, are inevitable, and no constitutional guarantee exists to remedy them. Rather, state election laws must be relied upon to provide the proper remedy.

Id. (citations omitted); *see also* Welch v. McKenzie, 765 F.2d 1311 (5th Cir. 1985) (finding that despite numerous violations of state election laws, no federal constitutional violation occurred in absence of racially discriminatory intent behind those violations or racial vote dilution occurring); Pettengill v. Putnam Co. R-1 Sch. Dist., 472 F.2d 121, 122 (8th Cir. 1973) (concluding that federal courts should not become the "arbiter of disputes" which arise in elections and attempt to "oversee the administrative details of a local election" absent aggravating factors such as denial of the vote on grounds of race or fraudulent interference with a free election by stuffing of the ballot box and holding that there was no federal violation in alleged improper counting of ballots).

32. Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995) [hereinafter *Roe I*] (quoting Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. Unit B 1981)).

33. *Id.*

IV. IDENTIFYING "NEW LAW"[34]

The most intriguing finding of an unconstitutional change in state election law arose out of disputed statewide elections in Alabama in 1994 for the Chief Justice of the Alabama Supreme Court and the State Treasurer. Initially, vote tallies showed an extremely close race, particularly for Chief Justice, where 200 to 300 votes appeared to be the margin of victory.[35] The *Roe* litigation, a massive and lengthy dispute that intertwined the federal and state courts over many years, arose over 1,000 to 2,000 contested absentee ballots not counted in the initial returns.[36] The critical state-law question was whether those ballots were illegal and not to be counted because they were improperly notarized or witnessed. And the further question, which eventually triggered a federal constitutional decision in the Court of Appeals for the Eleventh Circuit, was whether the answer the Alabama state courts gave to *that* question—whether these absentee ballots should be counted—was *itself* an answer that was consistent with prior state law and practice on absentee ballots. If not—if the Alabama courts had changed a clearly established rule of state law or well-established state practices—did the decision of the state judicial system then amount to a federal constitutional violation? What is the federal interest in ensuring consistency and regularity in state elections, and if such an interest exists, what must be proven to establish a violation of that interest?

The minuet between state and federal judicial acts in the *Roe* litigation reveals a lot about the relationship between federal and state courts also at issue in *Bush v. Gore*. First, after the results of the disputed election became known, some absentee voters sought an order from the state circuit court requiring the contested absentee ballots to be counted.[37] That court issued a temporary restraining order that forced the Secretary of State to wait until the county canvassing officials had included the contested absentee ballots in the vote totals before certifying the election.[38] Second, in response to this decision, other voters and two candidates sought an injunction in federal district court ordering state officials to disregard the state circuit court's order.[39] The federal district court found that the state court order constituted a change in Alabama's past practice for dealing with ab-

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34. Portions of Part IV, describing the procedural posture of the *Roe* and *Griffin* cases, are derived from SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 10-19 (rev. ed. 2001).

35. *Roe I*, 43 F.3d at 578.

36. The key substantive ruling of this litigation is found in *Roe I*.

37. *Roe I*, 43 F.3d at 578.

38. *Id.*

39. *Id.* at 579.

sentee ballots.[40] The federal court concluded that compliance with the state court order would violate the Fourteenth Amendment to the United States Constitution and entered a preliminary injunction requiring the Secretary of State to omit the contested absentee ballots from the certified election results.[41]

Roe I resulted from the appeal of the district court's injunction. In that decision, the Eleventh Circuit concluded that federal constitutional interests would be implicated if the Alabama courts changed the state's practice of handling the contested ballots in issue.[42] As noted above, *Roe I* concluded that, in extraordinary circumstances, changes in state law could implicate Fourteenth Amendment principles of "fundamental fairness."[43] In elaborating on why such changes would do so—such as including the disputed absentee ballots if established state law and practice was to the contrary—the Eleventh Circuit identified two constitutional values at stake:

> First, counting ballots that were not previously counted would dilute the votes of those voters who met the requirements of [state law] as well as those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement.[44]

That is, a change in state law that had the effect of including ballots not previously included under state law would (1) constitute impermissible vote dilution and (2) disenfranchise, in effect, those voters who, in reliance on the previous rule, had not voted but would have voted had they known in advance that the rule would be what it now was under the new state interpretation.

But having established these principles, *Roe I* did not quickly jump to a substantive conclusion of its own that the Alabama courts had indeed violated these principles. Instead,

> *Roe I* . . . accommodated the diverse federal and state interests in disputed elections in the following way: having established the relevant substantive constitutional principles, *Roe I* then certified to the Alabama Supreme Court the central question of state law: did Alabama law make the contested absentee ballots legal or illegal votes? At the same time, the Eleventh Circuit ordered the Secretary of

40. *Id.*
41. *Id.*
42. *Id.* at 581.
43. *Id.*
44. *Id.*

> State not to certify any election results for Chief Justice and Treasurer, the two offices in question.[45]

In response to the Eleventh Circuit, the Alabama Supreme Court concluded that the ballots at issue were legal votes under state law.[46] The Eleventh Circuit then remanded the proceedings to federal district court for extensive findings of fact on seventeen specific questions posed to determine whether the state courts had in fact changed preexisting state election laws following the election.[47] The district court found that, before the contested election, Alabama "uniformly" excluded absentee ballots like those contested.[48] The Eleventh Circuit subsequently concluded that the district court's facts "were stronger in favor of the Roe Class than the prior panel could have expected" and that a change in state election practices had been convincingly proven.[49] The district court ordered the Secretary of State to certify the election results for the Chief Justice and State Treasurer *without* including the contested absentee ballots. In *Roe III*, the Eleventh Circuit affirmed this final judgment.[50] Thus, the federal courts ended up holding that a state court interpretation of state election law changed the preexisting state law to such an extent that it constituted an impermissible dilution of votes under the Fourteenth Amendment's Due Process Clause. The *Roe* litigation finally concluded almost one full year after the November 1994 election. The state circuit court's restraining order was entered on November 17, 1994, nine days after the election. The federal district court's preliminary injunction was then entered on December 5, 1994. *Roe I* was decided January 4, 1995. *Roe III*, which finally brought the litigation to a conclusion, was issued on October 13, 1995.

The other significant court of appeals decision on these issues is *Griffin v. Burns*,[51] a First Circuit decision that provided an important precedent in *Roe I*. *Griffin* involved the primary for a local city council race in Providence, Rhode Island, in which the Secretary of State concluded that the general election's absentee and shut-in ballot laws should also be applied to primaries.[52] State officials publicized the availability of such ballots, which ten percent of primary voters actually used.[53] Thomas McCormick won the machine count but lost the

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45. ISSACHAROFF, KARLAN & PILDES, *supra* note 34, at 10-11; *see also Roe I*, 43 F.3d at 583.

46. Roe v. Mobile County Appointment Bd., 676 So. 2d 1206, 1226 (Ala. 1995).

47. Roe v. Alabama, 52 F.3d 300 (11th Cir. 1995), *cert. denied*, 516 U.S. 908 (1995) [hereinafter *Roe II*].

48. Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995) [hereinafter *Roe III*].

49. *Id.* at 408.

50. *Id.* at 409.

51. 570 F.2d 1065 (1st Cir. 1978).

52. *Id.* at 1067.

53. *Id.*

total vote when these absentee ballots were included. He challenged the use of absentee ballots during primary elections and, in a 3 to 2 decision, the Rhode Island Supreme Court held that state law did not explicitly allow for the use of absentee ballots in primary elections.[54] Four days later, the Rhode Island Legislature amended the law to allow for the use of these ballots in primary elections.[55] Meanwhile, Lloyd Griffin, whose victory over McCormick had been reversed by the state supreme court's ruling, brought suit in federal district court (along with voters who had used the uncounted absentee ballots). The district court found that the state supreme court's decision violated these voters' constitutional rights and ordered a new primary election.[56]

The First Circuit affirmed.[57] On the substantive federal interest, the First Circuit noted that the Constitution does not require states to provide for absentee or shut-in voting in primary elections. The First Circuit, like other federal courts, also cautioned that despite the constitutional importance of the right to vote, federal courts tended to intervene in state election disputes only in the most limited circumstances: where state laws of general applicability are unconstitutional on their face, or where overt racial discrimination was involved.[58] In contrast, "garden variety" election irregularities involving election administration errors, malfunctioning voting machines, and even some claims of official misconduct, do not typically rise to the level of a constitutional violation, especially where the state provides adequate corrective processes.[59] Nonetheless, the First Circuit concluded that federal intervention was warranted in this context.

The justification for federal intervention was similar to that in *Roe I*: where "broad-gauged unfairness permeates an election, even if derived from apparently neutral action" an election process can reach a "point of patent and fundamental unfairness" triggering a due process violation.[60] "[D]ue process is implicated where the entire election process—including as part thereof the state's administrative and judicial corrective process—fails on its face to afford fundamental

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54. *Id.* at 1068 n.4.
55. *Id.* at 1068. The amended law was enacted at 1977 R.I. Pub. Laws 153.
56. *Griffin*, 570 F.2d at 1069.
57. *Id.* at 1079.
58. *Id.* at 1077.
59. As the First Circuit put it:

> If every election irregularity or contested vote involved a federal violation, the court would "be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law."

Id. (citation omitted).
60. *Id.*

fairness."[61] Applying this standard, the First Circuit did *not* hold, as in *Roe I*, that the Rhode Island Supreme Court had unconstitutionally changed state law. Instead, the First Circuit compared the state supreme court's decision with longstanding prior state practice; with the advice the relevant state administrative officials provided before the election; and with the state legislature's actions both before the supreme court decision (allowing regular use of such ballots in primaries) and after the decision (amending the law to expressly permit such ballots in primaries).

Thus the First Circuit concluded that absentee voters had reasonably relied on the advice that they could cast absentee ballots. The Rhode Island Supreme Court's decision was so unexpected that excluding these ballots—around ten percent of the total ballots cast—would violate principles of fundamental fairness embodied in the Fourteenth Amendment's Due Process Clause.[62] The voters' reliance on longstanding state practice was crucial to the decision. Evidence showed that a significant number of voters would have gone to the polls and voted in person had they known that absentee ballots were prohibited.[63] Because Rhode Island's Supreme Court had ruled that these votes were illegal, the First Circuit did not order the votes to be treated as legally cast.[64] Instead, the First Circuit affirmed the district court's use of its equitable powers to order a new primary election.[65]

The *Griffin* and *Roe* cases are the strongest court of appeals decisions that support a constitutional role for federal courts in overseeing potential "new law" that arises in the midst of elections and election disputes. The theory on which these cases rest, as well as the kind of proof required to establish a violation of their principles, provides a broader framework within which to assess *Bush v. Gore*.[66]

V. THE THEORY OF JUDGING "NEW LAW"

The constitutional violation established in *Roe* explicitly rests on "two effects" that implicate constitutional due process and equal protection concerns. In addition, I will suggest a third effect that might be implicit but important in cases like *Roe* and *Griffin*. One question

61. *Id.* at 1078.
62. *Id.* at 1078-79.
63. *Id.* at 1080.
64. *Id.* at 1079.
65. *Id.* at 1080.
66. A similar framework would explore the general jurisprudence regarding federal constitutional assessment of state judicial interpretations. Such a framework is provided in Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in* Bush v. Gore, 29 FLA. ST. U. L. REV. 493 (2001). Krent reaches similar conclusions as this Article does regarding the singularity of any "new law" basis for *Bush v. Gore*.

relevant to the "new law" dispute in *Bush v. Gore* is whether all these effects or only some of them ought to be required to justify federal rejection of state judicial interpretations.

The first effect centers on a bare change in state election law: the conclusion of a federal court that a state-court interpretation of state election laws effectively changes those laws. The second effect focuses on actual detrimental reliance of state voters on existing state election law before the state court interpretation at issue. Is a "change" in state law sufficient, in and of itself, to trigger the constitutional violation? Or must it be a "change" that also frustrates concrete and specific reliance interests of voters? Note that in the *Roe* litigation there was no allegation that state officials had engaged in fraudulent conduct or acted with partisan intent to manipulate outcomes; the claim was that even apparently neutral action could amount to unconstitutional unfairness through its effects on the electoral process.

A. Vote Dilution and Changes in State Law

The first effect is unconstitutional vote dilution that occurs when state election rules change to include votes not previously treated as legal votes under state law. Those injured would include voters who went to the polls and cast legal votes or who cast legal absentee votes; a change in state law that permits previously illegal votes to be counted then, apparently, dilutes the votes legally cast. Notice that in the view of the *Roe I* court, it does not matter whether state law is being "liberally" interpreted to admit disputed votes or "stringently" interpreted to exclude disputed votes; if state law has been changed, the constitutional violation occurs. According to *Roe I*, just as excluding ballots might deny the right to vote, including ballots that prior law requires be excluded is vote dilution—a form of ballot-box stuffing—and just as unconstitutional. Some federal courts, in contrast, conclude that state court rulings which enfranchise voters, rather than excluding them, should be given much greater deference. On this view, state rulings enfranchising voters can never amount to unconstitutional vote dilution, or if they can, the standard for proving that a franchise-expanding ruling is an impermissible change in state law is higher.[67] *Roe I* rejects this asymmetry, most likely because the constitutional interest is in ensuring the integrity and fun-

67. In *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825, 828 (1st. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), for example, the First Circuit rejected a "new law" argument by noting that the purported ruling would expand, rather than contract, the franchise. But the First Circuit also noted that there had been no detrimental reliance on the purported prior law, unlike in the First Circuit's earlier decision in *Griffin*; hence, the alternative grounds for decision make even *Partido Nuevo* less than a clear holding that changes in state election law can never amount to unconstitutional vote dilution if those changes expand the franchise. *Id.*

damental fairness of elections. That integrity can be violated just as readily by changing state law to add votes as by changing state law to subtract votes.

Even under this expansive conception of unconstitutional vote dilution, federal courts recognize the need to distinguish between ordinary disputes over counting ballots and state practices that reach the point of "patent and fundamental unfairness."[68] But suppose a federal court simply disagrees with a state court interpretation of the state's election laws, when the consequence of any judicial decision is to include or exclude certain ballots. If the federal court believes that state law requires excluding certain ballots, would *Roe* mean that unconstitutional vote dilution would occur were the state court to interpret state law differently and conclude that those ballots *should* be included? Or, if the state court excludes certain ballots, and the federal courts believe state law requires inclusion of such ballots, is this tantamount to unconstitutional vote dilution against voters whose votes have been excluded? There is a risk, certainly, that the principle of *Roe* would turn every dispute over the interpretation of state election law into a federal constitutional question. How troubling that risk is depends on how strong the evidence must be that a state court interpretation actually changes existing state law.

The question then becomes how convinced a federal court ought to be, with what evidentiary basis, that a state judicial decision changes state election practices enough to amount to a federal constitutional violation. We can imagine a spectrum of possible contexts. At one end, the prior state law can be embodied not only in written legal texts but in longstanding judicial and administrative practices consistent with those texts. The more the specific issue has been regularly confronted, particularly in contexts analogous to that at issue, the more possible it becomes to have a firmly anchored set of baseline laws and practices against which federal courts can assess any potential "changes" in state practices. In such a case, a federal court has a body of well-grounded evidence to draw on in assessing whether one particular state judicial ruling is a sharp departure from preexisting state rules.

That was precisely the situation in the *Roe* litigation. The Eleventh Circuit did not just offer its own free-standing interpretation of the meaning of Alabama law. Nor did the Eleventh Circuit base its interpretation solely on the words of a single state statute. Instead, that court came to judgment only after extensive proceedings to test the "new law" question in both state and lower federal courts. Most importantly, the federal district court, after a lengthy trial, had made the following factual findings: (1) every county in Alabama (except

68. Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995).

one) had consistently and for years excluded absentee ballots like those contested; (2) the Secretary of State had consistently maintained that ballots like those contested were not to be counted and had instructed every voting official in the State to that effect; (3) not one election official testified to the court that the contested ballots would ordinarily be included; and (4) had voters known they could have voted absentee under laxer standards, many more might have voted.[69] In light of this longstanding, unequivocal, consistent state practice, the district court concluded that the state circuit court's decision to include the ballots was an "abominable" postelection change of practice that amounted to unconstitutional "ballot-box stuffing."[70]

Now consider the other end of the spectrum. Suppose a state has an election law on the books that has not been tested or applied with any frequency (if at all) and hence has not been the subject of extensive judicial or administrative elaboration. Indeed, suppose the statute has never been applied to the type of election currently before the state courts. When the state courts interpret such a statute in the midst of this kind of election, what baseline can the federal courts use to assess whether that state interpretation is a dramatic "change in state law"? If there is limited or no evidence of actual prior state practices on the matter, nor even official positions that the Secretary of State has taken in advance and instructed state officials to follow, what kind of evidence can the federal court possibly look at to determine whether judicial interpretation has become an "abominable" postelection change?

In such a situation, the federal courts can hardly do anything other than second-guess whether the state court has read the statute the same way the federal court would, if the federal court had the power to interpret state law itself in the first instance. For virtually the only evidence the federal court would have before it would be the text of the state statute itself. Perhaps, in some states, the federal court would also have whatever legislative history was relevant—though, as is often the case, the state legislature might have enacted the statute without any thought at all about its application to the particular kind of election matter currently at issue. Yet this information, mostly confined to the text of the statute itself, is exactly the same information before the state court. If the federal court has no more than the text alone upon which to draw, is there a sufficient prior established state-law practice that ought to justify the "extraordinary" federal constitutional intervention that is warranted only when matters of "patent and fundamental unfairness" are involved?

69. Roe v. Mobile County Appointing Bd., 904 F. Supp. 1315, 1335 (S.D. Ala. 1995).
70. *Id.*

Even federal courts most aggressive in developing the "law of new law" have continually acknowledged that the task of doctrine in this area is to distinguish ordinary state election disputes from matters that warrant the extraordinary intervention of constitutional law because some "abominable" or comparable change in law has turned the election. Yet if a particular election context can only involve differences in views between state and federal courts over how state laws ought to be interpreted, where those differences cannot be grounded in anything other than the words of the particular statute itself—because there is no longstanding state practice one way or the other—how readily should federal courts conclude that a constitutional violation has occurred? At this pole of the spectrum of possible "new law" cases, there is a real danger that federal courts will simply substitute their own judgment about the proper meaning of state law rather than ensuring that the state acts consistently with its own prior laws and practices. This is precisely the intrusion on state interests that the architecture of the "new law" doctrine, taken as a whole, is designed to guard against. Ensuring meaningful consistency of state election practices is supposed to be the defining constitutional interest that justifies federal oversight, at least through the general commands of the Equal Protection and Due Process Clauses.

B. Detrimental Reliance, Due Process, and Constitutional Violations

Roe I identified not one but two constitutional defects that justified constitutional intervention. The first is vote dilution that can occur from sharp changes in state law, whether they expand or contract the franchise.[71] The second effect rests on detrimental reliance and appears to implicate values of due process rather than the anti-dilution principle of equally-weighted votes.[72] Here the constitutional question is whether the purportedly "new" state rule—had it been specified clearly in advance—would have led (or might have led) significant numbers of nonvoters to vote. In other words, the second constitutional concern is that voters and potential voters acted in reliance on a well-justified belief that state law required or permitted X, where X is a condition of casting a valid vote. Where X is a required condition of voting, and state institutions conclude after an election that X was not actually required, voters who would have voted (or might have voted) had they known X was not required have had their constitutional rights violated. Similarly, where X is a permitted mode of voting, but state institutions conclude, after ballots have been cast, that X is not a permitted mode, voters who would have voted (or might have voted) in some alternative mode have also

71. *Roe I*, 43 F.3d at 581.
72. *Id.*

had their rights violated. In either case, because voters appropriately relied to their detriment on a well-grounded belief that state law was X, their due process rights—of fair notice with regard to conditions on the right to vote—have been violated.

This theory of detrimental reliance as the basis of constitutional injury was also implicated in *Roe I*. The disputed state judicial interpretation of Alabama law made it easier for voters to cast absentee ballots. Thus, according to the *Roe I* court, the postelection change in interpretation "disenfranchised" those who would have voted but for the more onerous absentee ballot restrictions previous state practice had imposed.[73] Because voters notified in advance of the "new rule" might well have voted, the retroactive adoption of this rule violated their due process rights. *Griffin*'s "changed law" holding is grounded even more strongly in the fact of detrimental reliance. As noted above, plaintiffs produced evidence that, had they known in advance that absentee voting would not be permitted, at least some of them would have gone to the polls.[74]

Thus, *Roe I* and *Griffin*, which stand as examples of federal case law most willing to find an unconstitutional state creation of "new law," involved both vote dilution and detrimental reliance. A key question about this line of cases is, thus, whether *both* effects are necessary to establish this constitutional violation. It is not hard to imagine a state judicial decision that arguably changes state election law, but not in a way that could plausibly be said to deny due process by effectively disenfranchising voters who would otherwise have voted had they known of the new rule. Under the *Roe-Griffin* line of cases, would such a state court interpretation violate the Constitution? Whether either vote dilution or detrimental reliance, standing alone, is sufficient to establish a violation, or whether both are necessary, had not been resolved in the lower courts at the time of *Bush v. Gore*. Yet as we will see, once we identify these two potential justifications, there will be no need to untangle the precise relationship between them in order to assess *Bush v. Gore* itself through the framework these cases offer.

C. Structural Considerations and Elections: When is Distrust of State Courts Most Appropriate?

Though neither *Roe* nor *Griffin* mentions this factor, a third element leaps out from both cases. Both involve state judiciaries—indeed, elected state judiciaries—ruling on disputed elections for state offices. Indeed, *Roe* involves the remarkable prospect of the Alabama Supreme Court potentially deciding who has been validly

73. *Id.*
74. Griffin v. Burns, 570 F.2d 1065, 1080 (1st Cir. 1978).

elected to be the next Chief Justice of the Alabama Supreme Court. Much of the constitutional law of democracy makes the federal judicial role turn on structural circumstances in which other decisionmakers, such as state legislatures, are too strongly self-interested in the matter at hand to be left free of constitutional oversight. This is the functional justification the Supreme Court centrally relied on, for example, when it decided that state legislative districting plans should be subject to federal constitutional scrutiny.[75] As John Hart Ely famously put it, post-1938 Supreme Court jurisprudence has found constitutional intervention most readily justified when democratic institutions are potentially compromised and hence to be distrusted with respect to particular issues; much of modern constitutional law treats this distrust as present when democratic institutions are potentially self-interested players in the issue at hand.[76]

It is hard not to be anxious at the image of an elected state judiciary deciding who has been validly elected its next Chief Justice. If constitutional law recognizes a general bar against "new law" in the election context, perhaps the degree to which federal courts aggressively scrutinize such claims should turn—or implicitly does turn—on the extent to which alternative decisionmakers, such as state courts, are to be viewed skeptically in light of their potentially compromised position. Such a view would not require a romanticized view of federal courts as always impartial and detached from these electoral conflicts; the issue is the more pragmatic one of relative institutional position and relative institutional detachment. That the Alabama Supreme Court would be a more troubling forum than the Eleventh Circuit in deciding who holds the highest elective offices in Alabama, or that the Rhode Island Supreme Court is a potentially less detached actor than the First Circuit in making rulings that affect the outcome of state and local races, does not seem farfetched. As I have said, this kind of structural analysis is characteristic of much of the modern law of democracy.[77] Of course, it is unlikely that fed-

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75. *See* Baker v. Carr, 369 U.S. 186 (1962).

76. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77, 101-03 (1980). Looking backward, Ely's theoretical framework was doctrinally rooted in *Carolene Products*, in which the Court itself self-consciously announced that more exacting judicial scrutiny might be appropriate for legislation which "restricts those political processes which can ordinarily be expected" to provide legitimacy to democratic outcomes. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Looking forward, Ely's framework has been extended to suggest a variety of other legal regulations legislators have used in the past and the present, beyond those recognized in Ely's work, to seek to perpetuate their political power—regulations for which similarly exacting judicial scrutiny is arguably appropriate, though the current Court fails to engage in such scrutiny in these contexts. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

77. For an extended analysis of the law of democracy in these terms, see Issacharoff & Pildes, *supra* note 76.

eral courts would mention such considerations in their decisions. Moreover, perhaps this unarticulated posture of distrust is more justifiable for some state election contexts rather than others; *Roe* affords a powerful example of a context in which such distrust might be most appropriate.

If the relative structural positions of state and federal courts ought to play a role in applying the "new law" doctrine, a paradoxical result would follow. Federal court scrutiny under the "new law" doctrine should be strongest, on this view, in state elections, particularly those for the highest state offices. For it is here that federal courts might be thought to have the greatest structural advantage over state institutions, if reasons do exist for greater skepticism of state courts in state election contexts. Yet at the same time any such structural federal-court advantage would dissolve when federal elections are at stake. One need not be more skeptical of federal courts than state courts when federal elections are involved to believe that federal courts have no unique structural advantage that would incline them toward greater impartiality in federal elections.[78]

This structural analysis is merely meant to be suggestive. Whether it would be sound for federal courts to tighten the screws on "new law" doctrine depending on their judgment about the relative impartiality of state actors—either for a category of election contests or on a (more controversial) context-by-context basis—is a sensitive proposition. But for current purposes, it is enough to note the distinctly compelling structural context for federal oversight present in *Roe* and, to a lesser extent, perhaps also in *Griffin*. For with this analysis of the actual and possible underpinnings of the case law in place, it is now possible to gain some traction in assessing the United States Supreme Court's obvious and dominating concern that the Florida Supreme Court was creating "new law" in the midst of resolving the 2000 election.

VI. *BUSH V. GORE* IN THE FRAMEWORK OF "NEW LAW" MORE BROADLY

The pre-*Bush v. Gore* development, in at least some federal courts, of constitutional constraints against "new" state election law reveals a rejection of the strong federalist position that states and local governments should continue to have full autonomy over administration of state election rules, even for national contests. At the same time,

78. I leave to the side here longstanding debates about whether the general institutional features of federal courts, including lifetime tenure, should be viewed as making those courts more likely than state courts to decide certain matters more in accord with the ideals of judging. My focus is on uniquely distinctive features of both federal and state courts of special relevance in the electoral context.

this lower court jurisprudence identifies and suggests specific elements necessary to prove that state courts have indeed changed state law sufficiently to justify the otherwise extraordinary prospect of federal oversight. The principle against "new law," therefore, has been given a rule-bound, circumscribed content in those courts that have developed it; this rule-bound approach is designed to accommodate the competing interests—in protecting the constitutional dimensions of the right to vote and in protecting the values associated with decentralized implementation of that right—while doing so in a way that produces consistent, principled, transparent doctrine. The *Roe-Griffin* line of cases shows the greatest willingness among lower federal courts to enforce "new law" doctrine, and the question now is how *Bush v. Gore* compares to the framework for the most aggressive prior applications of "new law" doctrine. That is, accepting that there should be some constitutional constraint against new election law, are the same elements present in *Bush v. Gore* that justified the most stringent prior applications of such a doctrine?

Briefly put, the answer is no. Indeed, *none* of the factors previously necessary to trigger a finding of impermissible "new law" were present in *Bush v. Gore*. This in itself does not establish that *Bush v. Gore* is wrong in its "new law" concerns. But it does help to pin down more precisely how idiosyncratic are the conclusions of Justices and academic commentators that the Florida court made "new law" when those conclusions are compared to the most aggressive prior applications of this doctrine. Thus, while some have assailed *Bush v. Gore* for its willingness to intrude at all into judgments of state law, the point here is different: even if there are sound constitutional principles that support federal oversight of state rulings on election law, the specific elements previously thought to justify overturning state rulings were absent in *Bush v. Gore*.

The per curiam decision rested on more than just a judgment about new law, of course; central to the Court's decision was the substantive and procedural equal protection ruling that different counties could not adopt different standards, in the middle of the recount process, as to what constitutes a valid vote. The analysis here does not address those issues.[79] But to the extent the threat that Florida courts were making "new law" loomed over the entire case and influenced not just the concurrence but the general atmosphere in which *Bush v. Gore* was heard, the analysis here does suggest how that sense of threat was untethered to any of the specific elements federal courts had previously thought to be required to justify concluding that state courts had unconstitutionally made new election law.

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79. The best justification of the Court's equal protection holding is Einer Elhauge, *The Lessons of Florida 2000*, 111 POL'Y REV. 15 (2001-02).

In the remaining pages, I will quickly suggest why the specific elements typically present in "new law" cases were absent from the 2000 election litigation.

A. Vote Dilution

As noted above, election contests can arise across a spectrum of contexts which vary in how firm a basis prior state law and practice provide for any federal court assessment of whether state court interpretations change that prior law. The presidential election dispute in Florida arose, it turns out, all the way at one extreme of this spectrum. Florida law provided for the protest and the contest of disputed elections.[80] Yet unlike in *Roe* or *Griffin*, nothing comparable in the prior administrative practice of implementing these laws or in prior Florida judicial decisions—or in the apparent legislative history and context of the statutes themselves—could convincingly establish a clear prior practice or interpretation of the disputed laws. Each side, of course, argued (as its role required) that the prior law was clear. But leaving aside the inevitable and interminable debates about how to read an isolated Florida case or two, the reality is that prior Florida law and practice were not firmly established enough to enable the current Florida Supreme Court's decisions to be "objectively" assessed—that is, judged in a way that would generate a high degree of consensus among legally informed observers. This conclusion is not surprising in light of several factors.

First, with respect to the actual election laws themselves, there is little doubt that Florida's laws simply were not written with a presidential election contest in mind. Even in the frenzy of the litigation itself, it appeared from the face of these laws that the enacting Florida Legislature had not given a moment's thought to how the laws ought to be applied to a presidential election. The presidential election process poses myriad unique issues, not the least of which is the presence of federally-imposed deadlines that require any vote count and possible dispute to be resolved by certain dates. A number of state laws distinguish between processes for contesting state and local elections and the process for contesting a presidential election. But Florida law (along with that of some other states) makes no such distinction.[81] Since the election, enough time has passed to enable de-

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80. FLA. STAT. § 102.166 (2000), *amended by* Fla. Election Reform Act of 2001, 2001 Fla. Laws ch. 40, § 42, at 149, 152 (protest); FLA. STAT. § 102.168 (2000), *amended by* 2001 Fla. Laws ch. 40, § 44, at 149, 153 (contest).

81. *See* Eric Schickler et al., *Safe at Any Speed: Legislative Intent, The Electoral Count Act of 1887, and* Bush v. Gore, 16 J.L. & POL. (forthcoming 2001) (manuscript at 42, on file with the *Florida State University Law Review*). In a 1960 survey, the election contest legislation of nineteen states expressly dealt separately with presidential elections. Florida was listed as one of seventeen states whose election contest legislation referred

tailed studies of the legislative background of Florida election law, including the most recent preelection revision of those laws. These studies confirm what seemed apparent from the laws themselves: no evidence has been discovered to suggest that the Florida Legislature ever thought about the federal election calendar and the relevant federal statutory provisions, or that the legislature even focused at all on presidential elections when it wrote or revised the election-dispute laws. When the Florida Legislature enacted these laws, its sole focus was local and state elections.[82]

Second, even with respect to the elections the Florida Legislature did focus on, these laws were still badly drafted and incomplete. They failed to answer many of the obvious questions such laws need to address. Further, these laws were laced with provisions arguably in tension with each other—in part, perhaps, because different aspects of those laws had been enacted in different years. To a greater degree than judges often admit, these gaps, conflicts, and ambiguities often form the context in which courts must interpret the law. But as one who has examined the election laws in many states, I can attest that even by this lenient standard, Florida's laws at the time of the 2000 election were among the least well-drafted, least precise in the country.

When inartful laws are not written with specific contexts in mind, it is hardly surprising if their application to those contexts is uncertain. But incomplete or uncertain state law will often take on more settled meaning through ongoing applications of that law, which can occur in administrative or judicial proceedings. Here, however, a third factor emerged: preexisting Florida administrative and judicial practice had not contributed to establishing a clear set of resolutions for the kind of issues that arose in the 2000 election.

Uncontradicted assertions at oral argument before the Florida Supreme Court stated that the last *statewide* contest of an election in Florida had been in 1916 for the Governor's office[83]—long before the current statutes had been enacted. As a result, no clear administrative practice had emerged about issues such as the circumstances for

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generally to contests for "any office" or any "public office." Other states had varying provisions in common law or statutory law. *See* L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 338-39 (1961). The Florida contest of election provision in 2000 simply referred to contesting the election or nomination of "any person to office." FLA. STAT. § 102.168(1) (amended 2001).

82. Schickler et al., *supra* note 81, at 49 ("[A]lthough Florida lawmakers have repeatedly considered and revised their election statutes in recent decades, there is simply no evidence that legislators were ever mindful of the federal election calendar in general or of the Electoral Count Act's safe harbor provision in particular.").

83. *See Full Text of Dec. 7 Florida Supreme Court Hearing*, ORLANDO SENTINEL, *available at* http://www.orlandosentinel.com/news/nationworld/sns-2000election120700flacourttext.story.

statewide races in which recounts were permitted or how they had to be conducted. Similarly, previous Florida judicial decisions had not resolved the ambiguities and gaps in these statutes enough to provide determinate guidance—in advance of the 2000 election as to what meaning these unclear statutes would be given. With respect to a few issues, isolated decisions were arguably on point, though even then their implication for statewide issues was unclear. One county might have adopted a prior standard as to what constituted a valid vote, and one intermediate appellate court had concluded that undervotes arising from alleged technological errors could not justify a manual recount.[84] But there simply was no well-established, "thick" body of authoritative state law or administrative practice of significance that bore on the question of how Florida applied these disputed-election statutes to a statewide election contest.

Contrast this with the "new law" situations in *Roe I* and *Griffin*. In *Roe*, the district court found, after a three-day factual trial, that for at least the fifteen preceding years, the consistent, actual practice of sixty-six of Alabama's sixty-seven counties had been to exclude the specific kind of absentee ballot at issue there.[85] In addition, the "consistent and plain"[86] position of the Secretary of State, which had been communicated in writing to every voting official in the state, had always been that absentee ballots of the kind in dispute had to be excluded. As the District Court put it, this had been a "bright-line rule" in Alabama.[87] Similarly, in *Griffin*, the court of appeals found that the ballots in dispute had been treated as valid ballots according to "long-standing practice;" that state officials charged with running the election had presented the ballots as valid to voters; that the Secretary of State considered the ballots valid; and that the divided state supreme court decision stood in the face of these longstanding practices and formal administrative interpretations and actions.[88]

No record of this sort came close to existing in Florida. Indeed, one might hazard the view that any of the state judicial bodies that became involved in the litigation, including the Florida Supreme Court, would have been more than pleased had the prior law or election practice been more clearly settled than it was. Few judges, I suspect, would relish having themselves and their institutions thrust into a

84. On the existence of prior established counting rules, see, for example, POSNER, *supra* note 10, at 122 (stating that particular rule was "followed by the Palm Beach canvassing board in previous elections"). For an example of the use of the appellate case, see Bush v. Gore, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring) (citing Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992) (contending that Florida law does not require "the counting of improperly marked ballots")).

85. Roe v. Mobile County Appointing Bd., 904 F. Supp. 1315, 1335 (S.D. Ala. 1995).

86. *Id.*

87. *Id.*

88. Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978).

national arena on the most partisan of issues; most judges might well hope that the prior law would be clear enough to insulate them from an almost inevitable firestorm of criticism that would result whichever way they would rule. But despite all the litigation, none of the lawyers on either side appeared able to establish a clear Florida administrative or judicial practice on many of the disputed issues. Moreover, the concurring U.S. Supreme Court Justices who concluded that the Florida Supreme Court had unconstitutionally created new law were also unable to support this judgment by pointing to the kinds of records or facts or patterns of practice that had been present in *Roe* and *Griffin*. And the academic commentary that has endorsed *Bush v. Gore* on the grounds that the Florida Supreme Court decisions violated Article II—essentially, the grounds that that court had created "new law"—has similarly offered no well-established set of administrative practices or judicial rulings in Florida that would provide a firm baseline against which to measure the Florida Supreme Court's decisions. To be sure, critics and supporters of *Bush v. Gore* wave individual past decisions around from which they argue that prior law favored one side or the other. But both sides are required to make inferences, at best, from isolated decisions that do not directly address the specific practices at issue in any way comparable to the kind of firmly anchored baselines present in *Roe* and *Griffin*.

The dispute between the United States Supreme Court and the Florida Supreme Court thus could not boil down to anything other than a dispute over how to read the bare state election statutes themselves. Realistically, unlike in *Roe* and *Griffin*, no robust and meaningful evidence, external to the texts of those statutes, could enable federal court oversight of state court interpretation to rest on anything other than the statutory texts. At this point, federal and state courts can engage only in a head-on debate about how best to read these texts as texts—texts which were poorly drafted from the start and were not written with a presidential election in mind. No doubt, different judges and courts would come to different conclusions on many of the unsettled and ambiguous issues in Florida's election laws. But framed within the broader perspective of constitutional constraints on new election law, the question is whether federal courts should play a role at all in judging state court interpretations in the specific context in which federal court "oversight" of state institutions can be based on little more than disagreement about how best to read the bare texts of state laws.

Let us accept that the Constitution should constrain state courts from developing "new law" in the guise of interpreting existing law. The question, then, is not whether it is inappropriate for federal courts ever to intrude on the rulings of state courts about their own

election laws. In striking the balance between the national constitutional interests at stake and the values associated with decentralized control over elections, the important question becomes how *strong and convincing* the evidence ought to be before federal courts should hold state court interpretation equivalent to unconstitutional manipulation—manipulation being, in essence, what the "new law" doctrine was designed to guard against. That is the question too quickly overlooked in disputes between those who assert that states should retain full control of the meaning of their election laws and those who are prepared to turn their disagreement with the Florida Supreme Court's reading of state law into a justification for United States Supreme Court intervention. The pre-*Bush v. Gore* "new law" constitutional doctrine had developed to try to avoid either of these extremes and to accommodate the competing concerns behind the right to vote, on the one hand, and state decisionmaking, on the other.

Recall that, under that doctrine, state decisions had to constitute an "abominable" change in state practice in order to justify "extraordinary" federal constitutional intervention. Such federal intervention was necessary to ensure that no "patent and fundamental unfairness" was present that rose to the level of a federal constitutional violation. But when federal courts lack any firm anchor in a clear set of established prior practices, the central evidence of any purported change in state law can only be the text of the relevant statutes themselves and arguments about how best to interpret them. Should federal courts play a role at all in assessing state decisions when there is no evidence on which to anchor that judgment other than the very statutes being interpreted? Recall also that the purpose behind the factors identified to justify federal intervention in the prior "new law" cases was to protect national interests in the "fundamental fairness" of elections but, at the same time, to avoid turning every disputed state election law ruling into a federal constitutional question. Yet if mere disagreement about how best to read the text of state laws can be transformed into a constitutional issue, every dispute about state election law is indeed capable, in principle, of being turned into fodder for constitutional law.

Judge Richard Posner has mounted the most sustained academic defense of *Bush v. Gore*.[89] Doctrinally, he is prepared to defend the decision only on the ground that the Florida Supreme Court did indeed change prior state election law; he rejects the per curiam's alternative ground that the recount process violated equal protection.

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89. *See, e.g.*, POSNER, *supra* note 10; Richard A. Posner, Bush v. Gore*: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); Richard A. Posner, Bush v. Gore*: Reply to Friedman*, 29 FLA. ST. U. L. REV. 871 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1 (2000).

But the tepid crescendo of Judge Posner's defense is only that "[r]easonable judges could conclude that the Florida supreme court had so far disregarded the law as to violate [the Constitution.]"[90] And Judge Posner acknowledges that this "is a difficult issue."[91] Even if Judge Posner is right, the more pressing question should be whether that is enough. If competing interpretations of state election law are reasonable, should the federal system be structured so that federal courts have the power to make their interpretations prevail, when they have no more basis on which to condemn state courts than contrary views about how best to interpret legal texts? Certainly *Roe* and *Griffin* presented something considerably more compelling. Given the detailed evidence established in those cases, most federal judges would surely have concluded that state courts had changed state law. But that is a far different standard of proof than the one upon which Judge Posner's "new law" defense of *Bush v. Gore* relies.[92]

When potential conflicts between federal and state courts come down to little more than how best to read statutory texts—particularly those replete with seeming gaps and ambiguities—the difference in interpretation will frequently amount to a philosophical difference over how courts should generally go about interpreting statutes. This classic jurisprudential problem is one to which the American legal system does not offer any general answer. Put simplistically, two polar positions can be identified: purposive versus textual interpretation. In the former, courts conceive themselves to be in partnership with the legislature; the role of courts is to discover, as best as possible, the general purposes for which laws have been passed and then to further those purposes through acts of interpretation in cases where the statute's reach is otherwise unclear. Courts that emphasize textual interpretation, by contrast, tend to see themselves less as legislative partners and more as faithful agents; such courts view the legislature to have expressed its purpose through the text of the statute itself. The court's role is to apply the text according to its terms. With purposive interpretation, courts take an active role in seeking to harmonize statutory schemes as a

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90. Electronic Dialogue from Judge Richard A. Posner to Professor Alan M. Dershowitz, *supra* note 9.

91. *Id.*

92. Ultimately, Judge Posner would defend the result in *Bush v. Gore* on pragmatic, rather than doctrinal, grounds. His central argument is that the consequences of allowing the election dispute to continue would have been bad enough for the country that the Court should have terminated that dispute for that reason, as long as there were some plausible constitutional footing for doing so. My own view, based on the Court's pattern of decisions in other cases involving the structure of democratic processes, is that pragmatic reasons of this sort likely did play a more important role than doctrinal considerations in *Bush v. Gore*. *See* Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

whole, or to fill in gaps and ambiguities according to judicial judgments about the underlying legislative purpose. With textual interpretation, courts hew as closely as possible to the specific terms of the written text, without further judgments about whether direct textual application appears to advance what the courts view as the legislature's underlying objectives.

Which of these views prevailed in American law before the 2000 election? Neither. There was no clearly established prior law, at the general methodological level, regarding how statutes ought to be interpreted. Rather, the answer has varied both over time and between different courts within our radically decentralized system of legal authority. Purposive methods, for example, more or less dominated within the United States Supreme Court from the 1950s to the 1980s. Since then, certain Justices have argued strongly for textual interpretation. That textual approach has gained strength in recent years, though the Court is now internally divided on these questions. The answer also varies throughout the American legal system; this is not the kind of question on which the Supreme Court can impose a uniform approach on all courts. Nor can it be said that the general intellectual culture of law in the United States, today, generally endorses one of these methods to the exclusion of the other.

Faced with ineptly drafted election laws, the Florida Supreme Court took what it considered a purposive approach and sought to adapt a statutory scheme, written with only state and local recounts in mind, to the context of a presidential election. As far as I can tell, this Florida Supreme Court regularly engages in purposive interpretation of statutes, in election and many other cases. On the other hand, several members of the United States Supreme Court fervently believe it is precisely these open-ended methods of purposive interpretation that allow courts to impose their own views of desired outcomes on statutory schemes; for that reason, these Justices strongly embrace textual interpretation. It is these Justices who focused their constitutional rejection (based technically on Article II, Section 1 of the United States Constitution) of the Florida court's decision on the latter court's statutory interpretations. So vehement were these textually committed Supreme Court Justices—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—that they excoriated the Florida Supreme Court in the most disparaging rhetoric: the Florida court's readings were "absurd," ones "[n]o reasonable person" would endorse, and "plainly departed from the legislative scheme."[93] From a textualist's perspective, purposive interpreters regularly depart from the legislative scheme; it is in the very nature of purposive interpretation to do so. At the same time, these critical Supreme Court Justices do

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93. Bush v. Gore, 531 U.S. 98, 118-19 (2000) (Rehnquist, C.J., concurring).

regularly demand fidelity to legislative text as text: their textualism also applies across different statutory contexts. To the extent the Supreme Court majority viewed the Florida Supreme Court as a runaway court,[94] much of that belief might ultimately have stemmed from fundamentally different philosophies of statutory interpretation—philosophies the concurring Supreme Court Justices and the Florida Supreme Court majority each apply with some consistency, yet which differ radically from each other.

In sum, new election law has previously been held to become unconstitutional vote dilution only when prior state practice had established a firm baseline against which the claim of new law could be tested. In *Bush v. Gore*, by contrast, the dispute over "new law" essentially came down to a dispute over how to read the bare statutory text alone. Any such dispute will implicate philosophical views about proper methods of statutory interpretation, views that may differ across courts, though any one court might consistently adhere to a particular approach. The central question about a "new law" defense of *Bush v. Gore* is whether these kinds of differences—over how to read statutes when their meaning is not previously settled in fairly unequivocal ways, as in *Roe* and *Griffin*—should provide enough of a basis to justify federal court overturning of state court interpretations of state law.

B. Detrimental Reliance

Detrimental reliance of individual voters on the "prior" law is either necessary or sufficient in the *Roe-Griffin* line for arguable changes in state law to rise to the level of a constitutional violation. In the legal sense, this detrimental reliance has a specific meaning: voters who relied on the purported prior state of the law would (or might) have acted differently had they known that law not to be correct. There is no basis I can see for finding such detrimental reliance in *Bush v. Gore*, even assuming that any of the Florida Supreme Court rulings "changed" the state's prior election laws. Recall the kind of legal rulings at issue: whether to permit manual recounts absent a showing of machine error; whether to count as valid ballots that had been marked in particular ways; whether to permit amended returns from selective hand recounts to be included in the precertification vote totals; and whether to permit a postcertification contest of an election which involved extensive hand recounts of "undervoted" ballots across numerous counties.

Whatever else might be said about these decisions, if they do constitute a change of law, they do not do so in a way that would impli-

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94. David A. Strauss, Bush v. Gore: *What Were They Thinking?*, 68 U. CHI. L. REV. 737, 751-55 (2001).

cate detrimental reliance on the part of voters comparable to that in *Roe* and *Griffin*. Would any voters be able to claim plausibly that had they known the Florida Supreme Court would have authorized hand recounts, those voters would have acted in some different way—somehow changed their voting practices? Take the much disputed issue of what constituted a valid vote on a punch-card ballot: a claim of detrimental reliance would amount to voters asserting that, had they known they could get a vote counted without fully punching out the chad on a punch-card ballot, they would have done so. That any voter who did not vote could plausibly claim, as in *Griffin*, that they would have turned out at the polls had they only known a partially punched chad would be treated as a valid vote seems implausible. And that voters who did the work required to punch out the actual chad could claim that their constitutional reliance interests were violated because they had to do more work than state law turned out actually to require is just as implausible. The same seems true of the other issues in dispute. Because those disputes involved relatively obscure issues of the vote counting and recount process, it is hard to imagine that any voters or nonvoters structured their conduct around existing law and would have been likely to act differently had they known the law would emerge as it did from the Florida Supreme Court.

Detrimental reliance, in the legal sense recognized in *Roe* and *Griffin*, and more generally throughout the law, is not an abstract expectation, hope, or desire that the law remain the same. In the election context, the claim requires a more concrete and tangible effect than that voters had voted in reliance on a fair election system, and that the courts were depriving them of that expectation by changing the rules of the game through "new law" creation. The concept requires a specific change of position in reliance on the existing law, a change of position that would not have been made had the actor known the law to be different. In the election context, individual voters would have to be able to establish that the courts had retroactively changed the election process in a way to which those voters would have self-protectively responded ex ante had they known of the change in advance. Whatever the merits of the Florida court decisions, I cannot see any plausible claim of detrimental reliance, based on the purported prior state of the law, that would be legally recognizable. Despite the centrality of detrimental reliance in the lower courts, *Bush v. Gore* did not purport to show that such reliance had been present in Florida; *Bush v. Gore* did not address the relevance of detrimental reliance at all.

C. *Structural Considerations and Relative Institutional Distrust*

I have speculated that, as a descriptive matter, lower federal courts might implicitly be most aggressive in scrutinizing claims of "new law" in cases in which the federal courts have most reason to be wary of the structural position of state courts vis-á-vis the election at issue (compared to the position of the federal courts). This distrust might be greatest when the election involves the state supreme court itself, as in *Roe*; or perhaps for other high state offices as well; or perhaps most expansively, for any state or local office. Normatively, such a view would be consistent with much of the theoretical underpinnings for the constitutional role of federal courts in overseeing democratic processes more generally. If there are convincing functional reasons that federal courts systematically are more likely than state courts on certain types of elections to bring the desired detachment to bear, such reasons could support more active application of the "new law" doctrine. Structural considerations of this sort were transparently at work in the two "new law" cases from outside the election context upon which the concurrence in *Bush v. Gore* relied;[95] both arose out of the early civil rights movement in which the state supreme courts involved, from Alabama and South Carolina, had proven to be systematically hostile, like their state legislatures of the era, over a series of cases to civil rights claims.

If structural analysis of this sort ought to play a role in "new law" cases, the crucial consideration must be whether state courts can be deemed *systematically* compromised or disadvantaged with respect to the relevant election law issues. The point of taking this consideration into account—like taking vote dilution or detrimental reliance into account—is to find some place to stand, outside the context of the specific case at issue, from which a principled and consistent federal court judgment of new law can justifiably be made. If federal courts can conclude on an ad hoc basis that a particular state court should be distrusted on the particular issue at hand, the point of invoking structural considerations would largely be defeated. Federal courts can appropriately be objects of distrust too. If structural considerations are to play a role in justifying federal oversight of state courts, federal courts must be able to point to a pattern broader than the particular case at issue to justify the implicit or explicit claim that they are better positioned than state courts to provide detached judgment.

Whether these considerations do or should play any role in cases like *Roe* and *Griffin* is unclear. But either way, structural analysis of

95. Bush v. Gore, 531 U.S. at 114-15 (Rehnquist, C.J., concurring) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)).

this sort would not support an aggressive approach to "new law" claims in *Bush v. Gore*. Charges of partisanship swirled around virtually every actor who touched upon any of the issues in this, the most politically explosive of all electoral issues; such charges will inevitably arise in contexts this incendiary—which does not make them wrong but does make them unavoidable. But there is no general structural reason to think that federal courts, or the United States Supreme Court, are better positioned than the state courts to have a comparative institutional advantage that would predictably make them less prone to the appearance or reality of partisan pressures or temptations. *Bush v. Gore* did not involve the Alabama Supreme Court deciding who had been validly elected Chief Justice to that court. There are no structural reasons to think that the United States Supreme Court would be any less "interested," in the pejorative sense, than the Florida courts in the outcome of the presidential election. Indeed, some have pressed all the way to the opposite conclusion: they have argued that the United States Supreme Court necessarily has a greater potential conflict of interest in the outcome, because the President of the United States will not be appointing Justices to the Florida Supreme Court.[96] But one need not view the United States Supreme Court as *more* "interested" in the outcome to recognize that no structural reasons militate in favor of designing doctrine on the assumption the Court would be *less* interested. The structural considerations that might justify greater skepticism of state courts for certain state elections are not present when the Presidency of the United States is at stake. To the extent that such considerations do or should play a role in federal court application of the "new law" doctrine, *Bush v. Gore* cannot persuasively invoke such considerations. Here too, *Bush v. Gore* did not purport to do so, though the lower courts have also not expressly relied upon such factors either. But if the *Roe-Griffin* line is best justified in part because such factors were present there, those factors were not present in *Bush v. Gore*.

96. Bruce Ackerman, *The Court Packs Itself*, THE AMERICAN PROSPECT, Feb. 12, 2001, *available at* http://www.prospect.org/print/V12/3/ackerman-b.html. Judge Posner, though a defender of the decision, states that the interest of Supreme Court Justices in who their colleagues will be, and hence who the President will be, "will forever cast a shadow over *Bush v. Gore*." Electronic Dialogue from Judge Richard A. Posner to Professor Alan M. Dershowitz, *supra* note 9. Judge Posner argues that this would have been true had the decision come out the other way. But it is precisely the inevitability of such potential conflicts that underlie arguments that the Supreme Court should have stayed out of the dispute and left Congress to resolve the contest. *See, e.g.*, Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001).

D. "New Law" and Article II of the Constitution

I have written about "new law" as a general legal concept (in the election context). Doctrinally, those lower courts that have developed and applied the concept have done so through the Fourteenth Amendment, under either the Equal Protection or Due Process Clauses. As we have seen, concerns about the possible creation of "new law" were pervasive in the United States Supreme Court's questions, in its formal opinions in the election litigation, and in much of the academic defense of *Bush v. Gore*. These concerns are reflected in certain aspects of the Court's equal protection holding; other aspects of that holding do not depend on any judgment that the Florida courts had changed state law. To the extent that judgments about "new law" play a role in *Bush v. Gore* through the Equal Protection Clause, the analysis here applies directly. I have been comparing how "new law" is treated as a matter of equal protection law in the federal courts most willing to overturn state election decisions and in the United States Supreme Court in *Bush v. Gore*.

But in *Bush v. Gore*, the problem of "new law" also arose under another doctrinal heading. The concurrence relied on Article II, Section 1 of the Constitution in holding that the Florida Supreme Court had, in effect, changed state law.[97] The question, then, is whether the concept of "new law" should be understood and applied differently under Article II than under the Equal Protection Clause. In particular, should or do the Article II, Section 1 provisions justify a greater federal court willingness to find "new law" than do the general provisions of the Fourteenth Amendment?

I cannot see why that would be so. Those who draw on Article II rely overwhelmingly—indeed, exclusively, I think it is fair to say—on a literal reading of the text of Article II. That text empowers each state to appoint presidential electors "in such Manner as the Legislature thereof may direct."[98] If this text had been designed to give federal courts a distinct and more aggressive role in overseeing state court election law decisions, those purposes could justify a different way of identifying "new law" for Article II purposes than for Fourteenth Amendment purposes. Or if the Article II text had a history of being applied to authorize greater federal court oversight of state election law rulings, that might also support a different approach under Article II than under the Fourteenth Amendment. But nothing extrinsic to the literal text of Article II itself has come to light thus far to support such a position. Indeed, nothing in the original history of Article II, or in the history of how those provisions have been understood over time, or in the United States Supreme Court decisions

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97. Bush v. Gore, 531 U.S. at 113-15 (Rehnquist, C.J., concurring).
98. U.S. CONST. art. II, § 1, cl. 2.

in the 2000 election litigation, or in the academic commentary supportive of the concurrence that has emerged since those decisions, points to substantial evidence, outside the text itself, for the view that Article II was knowingly and purposively designed or previously applied to support a more aggressive federal court stance toward claims of "new law" under Article II than under the Equal Protection Clause. The most extensive defense of *Bush v. Gore* on Article II grounds is Judge Posner's; but Judge Posner candidly admits that no reason exists to assert that Article II was designed to authorize a distinct federal court role in policing state courts in the presidential election context: "It is true that there is no evidence that the choice of this word [legislature] (rather than simply of 'state') was deliberate, or that the framers of the Constitution foresaw the use of Article II to limit the scope of state judicial intervention in the selection of a state's electors."[99] Actually, however, the case is worse than this: the evidence that has emerged is to the contrary.

The most detailed investigation into the history of Article II appears in this symposium issue, in Hayward H. Smith's article.[100] Smith is in accord with Posner that there is no evidence from the Constitutional Convention or the state ratifying conventions that any thought was given, one way or the other, as to whether the word "legislature" in Article II was designed to impose distinct and special constraints on state court interpretation of presidential elector laws.[101] But there is historical practice about how this provision was actually understood and applied, and that evidence does not support the view that state legislatures were any more "independent" when acting under Article II than they were when acting pursuant to authority delegated to them elsewhere in the Constitution.

Thus, the founding generation treated state constitutional provisions that authorized gubernatorial vetoes to apply to state legislation under Article II just as much as to any other state law. In addition, state constitutions determined how state legislatures were empowered to appoint presidential electors (as well as Senators, despite the text of the original Article I, Section 3, which empowered "the Legislature thereof" from each State to choose Senators). Thus, as a matter of historical practice, state legislatures were not understood at the time to be more "independent" by virtue of Article II of the

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99. Electronic Dialogue between Judge Richard A. Posner and Professor Alan M. Dershowitz, *supra* note 9 (Monday, July 9). In his book, Judge Posner puts the point a bit less directly. POSNER, *supra* note 10, at 156 ("The interpretation that I am suggesting is not compelled by case law, legislative history, or constitutional language. But neither is it blocked by any of these conventional interpretive guides.").

100. *See* Hayward H. Smith, *The History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

101. *Id.* at 741.

constraints and conditions on their power than they were when acting pursuant to any other source of authority. Nor has the seemingly comparable language of Article I, Section 4 ever been interpreted to authorize distinct and more aggressive federal court oversight of state court interpretations of laws regulating other national elections, such as for the United States House of Representatives.[102]

This is not the place for a full analysis of Article II. I rely on Smith's detailed work and the absence in the *Bush v. Gore* concurrence or academic commentary defending that concurrence of any evidence, to date at least, of original purposes or historical practices under Article II that would rebut Smith's findings. More importantly, I am not arguing for the maximalist view that Article II does *not* authorize any federal court oversight of state courts in the presidential election context. I am only arguing that it is appropriate, if federal courts are to do so under Article II, to look by analogy at how federal courts have defined "new law" for Fourteenth Amendment purposes. Absent any specific purpose behind Article II or historical practice applying it that would give any concrete content to the concept of "new law"—or, put in institutional terms, to the boundary between state legislatures and state courts—we will have to provide that content through theoretical analysis of how the concept of "new law" ought to be understood. That requires accommodating the competing concerns at stake: the values associated with the modern, constitutionalized right to vote and the values of decentralized control over election regulation. That analysis also requires defining the justifications that motivate the need for such a concept and determining how courts should identify when new election law has been created impermissibly.

All those considerations transcend the specific constitutional provisions involved, whether that provision is the Fourteenth Amendment or Article II. Thus, it seems appropriate to compare how federal courts have identified "new law" for Fourteenth Amendment purposes and how individual Justices in *Bush v. Gore* identified "new law." Viewed against this deeper background of federal court practice, any "new law" defense of *Bush v. Gore*—as in the concurrence, in most academic commentary that has supported the Court's result, and in aspects of the per curiam—would entail a balder disagreement about how to read the bare words of election-law texts than any federal court has previously relied upon to justify the judgment that a state court has "changed the rules in the middle of the game" dur-

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102. Article I, Section 4 provides "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ." The leading precedent on this provision is *Smiley v. Holm*, 285 U.S. 355 (1932).

ing an election dispute. I know of no instance in which a federal court has previously "convicted" a state court of such a change without that conviction resting on a far more firmly anchored baseline of past state law and practice than anything that was present in the 2000 election litigation.

VII. CONCLUSION

Defenders of America's extraordinarily decentralized voting system criticize *Bush v. Gore* for its nationalist and centralized intrusion on the state regulation of elections, even when that state regulation takes the form of state court interpretation of state election law. This "federalist" critique, taken in its strongest form, argues that neither constitutional law nor sound principle licenses federal courts to decide whether state courts are making new law in the context of resolving election contests. I take James Gardner to be defending a position along these lines in his contribution to this symposium.[103] But pushed that far, the position ought to raise concerns, at the least, when it comes to national elections. The reaction of foreign observers to the 2000 election may perhaps reveal something of the peculiarity of this strong federalist position. Having learned how dramatically localized electoral processes are for national office in the United States, these commentators find our decentralization hard to explain on anything other than historical, rather than functional, grounds. Thus, Shlomo Avineri, an Israeli political scientist, points out that most democratic countries have a National Election Commission, in some form, that seeks to ensure uniformity of processes for national elections.[104] Similarly, Justice Nöelle Lenoir points out that in France, all presidential elections are regulated and "subject to permanent vigilant monitoring" by a single entity, the Constitutional Council (Lenoir was formerly a Justice on the Council); this appointed body, designed to be independent, has exclusive power to regulate and resolve controversies over presidential elections in France.[105] Of course these perspectives have no direct bearing on the legal allocation of power between national and state institutions in the United States. But they do provide a comparative vantage point on how unusual it would be to have no national institutional oversight of election contests for national office.

Even before *Bush v. Gore*, United States constitutional law did not embrace such an extreme position. Due in part to the age of our Con-

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103. Gardner, *supra* note 1.

104. Shlomo Avineri, *A Flawed Yet Resilient System: A View From Jerusalem*, *in* THE LONGEST NIGHT, *supra* note 15 (manuscript at 8, on file with the *Florida State University Law Review*).

105. Lenoir, *supra* note 15, at 37.

stitution, we do not have the intermediate institutions, such as National Election Commissions, that oversee democracy in many more recently created constitutional democracies. Instead, federal courts have provided a degree of that oversight since the United States Supreme Court in the 1960s began to recognize national constitutional interests associated with voting and the design of America's democratic institutions. Constitutional law has, therefore, been a major source for some degree of the nationalization that one might expect for determining the ground rules of national democratic processes. In accord with these constitutional (and therefore national) interests, some federal courts had closely scrutinized state courts to ensure they were not making "new law" when resolving election disputes. But even the most aggressive of these federal courts had sought to circumscribe this scrutiny by identifying specific, narrow, and precisely defined circumstances in which such scrutiny was justified. This Essay has not addressed the equal protection holding of *Bush v. Gore*. But I have tried to provide perspective, from within the voting rights field, on previous resolutions of disputes over whether state courts had created "new law" in election contexts. To the extent that aspects of *Bush v. Gore*—the decision or the debate about the decision—rest on the judgment that Florida's courts had created "new law," the prior law of voting rights suggests just how exceptional any such judgment would be.